

Remarks - General

Applicant has changed the specification to record the prior art cited by the Office Action of March 9, 2004 into the specification, for a more complete disclosure.

Applicant has also rewritten all claims for overcoming the rejections under Section 35 U.S.C 103(a), and so as not to infringe with the aspects of Applicant's own divisional applications, from the above application.

Applicant has submitted evidence of prior building and testing of the above invention, in order to eliminate references 6,177,110 to Chan, and 6,054,158 to Hart et al., in order to remedy the rejections under Section 35 U.S.C 103(a).

The objection to the claims Under 35 U.S.C. 103(a)

Claims 99-103, 105, 107, 108, 109, 113, 119-121, 122, 125-127, 129,130-133, 135 and 136 were objected to under 35 U.S.C. 103(a) as being unpatentable over Van Dueren (Swiss 649,197) in view of Chan (6,177,110) and Laskey (1,566,329) further in view of Tezuka et al (4,399,153), Firmin (1,769,110), Jones (1,947,010) and Musher (2,217,700).

Applicant will first discuss the references and the general novelty of the present invention and its unobviousness over the references.

Van Dueren (Swiss 649,197) teaches a tubular biscuit sheath filled with a custard-like stuffing, which is used to support a frozen confection. Applicant uses a candy composite support for supporting a frozen comestible. Van Dueren does not contemplate a moisture resistant composite support, a composite support with a moisture resistant coating, or a composite support made of moisture resistant candy. Applicant provides these features in order to provide a dependable support that will reliably support liquid based comestibles, such as ice cream, ices, and others, in the freezer for a long time. Applicant provides these new physical properties and surprising new results for the first time.

Patent 6,177,110 to Chan teaches a lollipop comprising a ball of hard candy and an edible stick. Chan's earliest effective date is his filing date, on June 23, 1998. Applicant has submitted documentation noting conception and reduction to practice before Chan's date, in order to eliminate this reference. In addition, Chan's lollipop is not known to support a frozen, or liquid

comestible, and his composite support is a simple sugar stick speckled with gum, or candy. His composite construction is not used for support purposes, but solely for entertainment purposes, for a hard ball of candy. Applicant has successfully designed a composite candy support that supports liquid frozen confections, as well as non-liquid frozen confections and does so, inexpensively and reliably, which Chan does not do.

Patent 1,566,329 to Laskey (1925) teaches of a tubular candy comprising the novel feature of ribbed interior walls to strengthen the walls of the candy and to minimize the amount of a filling. Laskey teaches of interior wall ribs to strengthen the tube, including if it is pulled and reduced to the proper diameter, "a common practice in the manufacture of candy." This patent teaches away from Applicant's invention in that it strives to minimize the filling, where Applicant welcomes additional fillings, and additives. Laskey's candy is never used as a support, nor is it ever his intention. His extruded candy was not contemplated to be used for supporting any comestible, let alone a frozen confection.

Further in view, Tezuka et al (4,399,153) provides a chewing gum stick for a frozen confection, which is inedible. Firmin (1,769,215) comprises a simple sugar stick having paraffin or

cocoa butter on it, to keep the stick from melting. Firmin's stick although protected on its end from melting, is prone to cracking when it is bitten, and it is not a composite support. Jones (1,947,010) teaches of a method to increase the adherence of the frozen confection to the stick by providing increased surface area in the form of adhering a wafer to the stick. His stick is a "thin strip of wood or other material, for instance, an edible substance such as hardened taffy or the like." This stick is very brittle and easily cracked if bitten. It is also not a composite support, like Applicant's, which resists breaking and cracking and is a totally edible composite candy support.

Musher (2,217,700) support has comestible shreds, such as corn flakes and potato chips on the exterior of his baked or wooden support. His support, if used as an edible stick, is not made of candy and is not a composite candy stick. Musher had not thought to make his stick chewy, to overcome brittleness and cracking when the support is bitten into. He did he contemplate using composite components within the support to mix them for strength, or to provide more than one flavor. He did not contemplate using a candy composite support, akin to a candy bar, to provide for a reliable supported comestible, which withstands prolonged freezer applications, when shipped and placed in large retail stores.

Consideration of Prior Art as Applied to Chan:

As noted above, patent 6,177,110 to Chan, issued on January 23, 2001, is not considered prior art with regard to the above application. Applicant has proven through documentation, a prior effective date of July 5, 1994, including that she had built and diligently tested a candy composite support for a frozen confection, prior to the effective date of the reference to Chan, on June 23, 1998, his filing date, (please see enclosed documentation). As a result, the combination of Van Dueren combined with Chan is unjustified. Applicant requests reconsideration and withdrawal of Chan as a prior art reference, in regard to the above application.

The reference does not teach what the Office Action relies upon it as supposedly teaching.

In addition, the Office Action recites:

" As evidenced by Chan, it was conventional in the art to employ candy as a handle to support a food material to be eaten like lollipops and frozen confections on sticks."

Chan's patent only establishes the use of an edible stick in a

lollipop and is not "conventional...to support a food material....and frozen confections on sticks." Chan makes no allegation, nor should it be deemed conventional, that his candy support is operative with "food material, ... and frozen confections on sticks," as the Office Action maintains. It cannot be extrapolated that a stick, such as Chan's candy stick, will be conventional to support other food. A support stick made for a "hard ball," non-frozen lollipop, will not necessarily support a frozen confection that is liquid, nor does Chan's patent vouch for, or teach the integrity of his support's interaction with a liquid, to provide a dependable, entirely edible supported frozen confection. This proposed reliability is unfounded.

It is not evidenced by Chan that "...it was conventional in the art to employ candy as a handle to support a food material to be eaten like lollipops and frozen confections on sticks." It is only evidenced that a candy support was used to construct a fully edible lollipop. Further, it is evidenced by Applicant's 1994 Document Disclosure, enclosed, that there is a difficulty in using certain sugar sticks to support ice cream, or a liquid-type confection. Applicant notes on page 2, para. 2, ll. 1-8 of this Disclosure Document:

"I thought of using a *candy swizzle stick* and just using it

instead of a wooden stick because there are a lot of ice cream flavors that have solid pieces of candy in them and they are still crunchy and not melted. In experimenting I found that *the candy has the tendency to melt just a little on the outside from coming in contact with the ice cream. This would make it hard for the ice cream to adhere to the stick and it would just rotate around and would not work.*

Also page 2, p. 2 of Applicants specification recites:

"Some confections, such as a candy canes or swizzle sticks, when inserted in a liquid-type confection, (such as ice cream) melt and will not adhere to frozen confection 84 because the moisture in the ice cream melts the outer layer of the candy cane or swizzle stick."

In addition, Chan uses a "granulated mixture that becomes pressed candy 16," (pg 8 of Chan's specification, p. 3, l. 5) Chan uses a simple sugar stick, with "a multiplicity of confectionary chips interspersed in the pressed candy." Chan uses the "chips" for entertainment purposes and not for support purposes, and he notes on page 6, p. 5, of his patent:

"The chips may be various kinds of candy or gum. Preferably,

they are small bits of bubble gum."

Also, page 6, p. 7, ll. 8-10 of his patent, Chan recites:

"preferably, the chips 18 in a single lollipop are a variety of colors. In order for the consumer to be able to enjoy these colors at the time of purchase and while the candy ball 4 is being consumed, the sleeve 20 is preferably transparent.)"

It is not certain that Chan's lollipop stick dependably supports a liquid frozen confection, unlike the candy swizzle stick noted above. Applicant uses the composite ingredients to construct a dependable support for supporting a liquid, or solid supported comestible. Applicant's claim 99, now new claim 139 recites:

"...(b) a substantially rigid, composite candy support comprising two discernable edible members in contact with each other suitable for supporting said frozen comestible, said two discernable edible members each being other than an edible coating, said composite candy support having a first portion extending into said frozen comestible, said first portion having sufficient surface area and means for adherence within said frozen

comestible to support said comestible, said composite candy support having a second portion extending outside said frozen comestible, said second portion having sufficient surface area to provide a utilitarian support for said comestible."

Pages 27 and 28, p. 2, of Applicant's specification recites:

Some confections, such as a candy canes or swizzle sticks, when inserted in a liquid-type confection, (such as ice cream) melt and will not adhere to frozen confection 84 because the moisture in the ice cream melts the outer layer of the candy cane or swizzle stick. Ice cream or other liquid-type frozen confections adhere nicely to chocolate (or other) barrier 86. Barrier 86 adheres to candy canes and swizzle sticks. Providing barrier 86 to these kinds of confections keeps the support from melting when that portion of it is inserted into confection 84 and provides adherence of frozen confection 84 to melting-type supports.

Barrier 86, on the inserted portion of support 62, (or any edible support) provides a very secure, long lasting hold on confection 84, so that support 62 does not slip or slide within confection 84. Barrier 86 often makes the successful combination of support 62 (or other supports) and confection 84 possible.

Accordingly, it is not evidenced by Chan that it was conventional in the art to employ candy as a handle to support a food material to be eaten like lollipops and liquid confections, such as frozen confections on sticks, as the Office Action maintains. In addition, if Chan's small bits are: "Preferably, they are small bits of bubble gum.", then this support is also not entirely edible.

If Chan and Van Dueren Were Combined in the Manner Proposed, the Proposed Combination Would Not Show All of Applicant's Novel Physical Features

The combination of Chan with Van Dueren does not show all of Applicant's novel physical features. Chan and Van Dueren's combined support does not show a support that could be reliably used for supporting ice cream. The combination also does not supply the reliability of Applicant's composite ingredients to a support a frozen comestible, and would have to be modified in order to make it work dependably. Their combination would not show a dependable, moisture resistant support, such as one made with chocolate and nuts. Chocolate and other chosen ingredients repel the liquid found in the liquid ice cream. Applicant's supports having a construction of layers, or mixtures of, for example: chocolate and layers of chopped nuts, or chocolate and

chocolate nougat, repel moisture, are chunky and make a sturdy support.

Applicant's support resists snapping and breaking into fractured pieces, when bitten into by a consumer, when shipped, or while in use as a support, since it is adapted to comprise a chewy texture and a degree of resiliency, (such as the use of a Baby Ruth Candy Bar tm, Snickers Candy Bar tm, or Milky Way Candy Bar tm, as a support). The combination of Chan and Van Dueren does not show a dependable support for supporting a liquid, such as ice cream and the like, as in Applicant's new claim 139. The combination does not show the use of two opposing handles, one for each hand, as in new claims 146 and 169, a lollipop within an ice pop, as in claims 148 and 175, the creation of a supported sandwiched confection, as in new claim 149 or voids for greater adherence and enhanced design, as in new claim 150.

The combinative does not show protective messguards, claim 154, dripguards, as in new claim 155, and a moisture resistant coating, either on the support or in between supported comestible layers, as in new claims 153, 156, 162, 169, and 176. The proposed combination is not suitable for supporting cake or a brownie, as in new claim 145, or twisted candy composite supports having multiple colors and ingredients, as in claims 152 and 176.

It does not have custom made supports for toddlers, as well as other aspects.

The Prior Art References of Van Dueren and Laskey are Vague, Foreign, Conflicting, Inoperative, and Very Old and, Therefore, are Weak and Should be Construed Narrowly.

Swiss patent 649,197, to Van Dueren is a foreign patent. To a person having ordinary skill in the art of supported frozen confections, Van Duren's patent would also be regarded as commercially in viable, and should be construed narrowly. Van Dueren discloses an elongated hollow biscuit sheath containing a custard-like filling for supporting a frozen ice cream confection. As is, this support would be inoperative as a dependable support. A biscuit, or cookie sheath (see Applicant's Amendment C) even if frozen, would absorb the liquid contents of a "food ice" (given in the translation of the reference or "...d'un baton-support pour glaces , etc,..." or "a support stick for ice cream.") Realistically, a cookie which has absorbed liquid, loses its rigidity and its support. This is akin to a cookie having been dunked into a glass of milk. This unprotected cookie loses its durability without fail. Van Dueren does not contemplate moisture resistant ingredients in his patent. Van Dueren's patent does not provide a dependable composite candy

support for a frozen comestible, such as ice cream.

Patent 1,566,329 to Laskey for filled candy, is quite old (1925) and weak as a reference. Furthermore, and importantly, the Office Action does not rely on its novel feature to teach a combined advantage with another reference, whether directly or inferred, and also should be construed narrowly. The Office Action of March 9, 2004, on page 2, p. 3, l. 7, states:

"Laskey, although not disclosing a composite as a support, nevertheless is further evidence of edible candy composites. To modify Van Dueren and substitute one conventional edible composite for another conventional edible composite for its art recognized and Applicant's intended function would therefore have been obvious."

Laskey's patent recites:

"... to provide a filled candy in tubular form which has projections extending inwardly from the inner walls of the tubes or cells. These projections serve both as a means for giving additional strength to the cellular candy and also as a means for increasing the proportion of candy material to the filling, or in other words, reducing the amount of

filling in proportion to the candy material."

This reference is weak and its novel feature teaches away from Applicants composite candy support. Applicant's support, as recited in 139, 159, 165, 170, and new dependant claims, adds more ingredients or fillings, and does not strive to lessen them, as does Laskey. Applicant's states on page 39, p. 1, lls. 4-9 of the specification, "Specific combinations and multi-layers of ingredients can also make the supports stronger. Different ingredients running concentrically, parallel or maneuvered within the stick, such as twisted within support 62 (or other supports) make the stick stronger and less prone to breakage." Applicant uses more fillings and a bulky stemmed support, such as a multi-ingredient candy bar, (such as a Milky Way or Snickers candy bar) which is contrary to Laskey's reasoning and intentions. Laskey's candy is not a support of any kind.

Laskey's 1925 intention is to lessen one of its two main ingredients, the filling. Laskey's patent combined with Van Dueren's Swiss biscuit support, which is apparently not viable for commercial success, because of its porous nature, and which most likely failed, does not suggest what Applicant has done. As suggested, the substituting of laskey's ingredients with that of Van Dureen would still need to be modified in order to be used as

a dependable support. The combination of the teachings of the references would be to provide ribs and to lessen Van Dueren's custard filling. This combination would not suggest the successful durability of Applicant's support with the use of ice cream, the novel use of a thickset composite candy bar support, such as a Snickers Candy Bar, to support an amount of ice cream. Applicant's support easily provides a moisture resistant, long term, freezer friendly, reliable support for ice cream. Applicant's support importantly is adapted to provide texture, such as a chewy texture, (although the support is substantially rigid) which provides reliability against breakage, since it provides a certain "give" and is significantly resistant to snapping into two or more pieces, especially when the support is eaten simultaneously with the ice cream.

The combination of the references also does not provide the features found in Applicant's dependent claims such as, protection against a warm hand, dependable fun shapes, shapes to fit a toddler's hand, or provide for a wide variety of food choices (important for a confection) such as nuts, raisins, fruit, coconut and peanut butter, in a myriad of different manners and combinations. These are advantageous novel physical features that allow Applicant's support to work independably over the prior art references, and any combination thereof, which are

unobvious and are therefore patentable.

The Prior Art References Do not contain Any Suggestion, Express or Impleied, to be Combined In the Manner Suggested

Those skilled in the art would not attempt to combine Laskey's patent with that of Van Dueren in order to make a liquid resistant composite candy support for a frozen confection, any more than the use of any other composite candy. There is no benefit to be derived from combining their teachings. Firstly, to modify Van Dueren, in view of Laskey, as suggested, substituting one conventional edible composite for another, would not be obvious, as Laskey uses ingredients that form a soft extruded tube that may be stretched and pulled, and Applicant's support, for the above claimed invention, is a "substantially rigid composite support." This combination would have to be modified, giving physical properties to the support that do not exist in the references. Secondly, since Laskey's relevant teachings, which are a means to determine obviousness, as stated by the PTO, are to incorporate ribs, it would not have been obvious to bring Laskey to the forefront from 1925 to modify Van Dueren in the manner suggested. In this case their teachings do not meld for any purpose. Laskey takes a mutually exclusive path from Applicant and reaches a different solution for a different task.

Other than to say that Laskey's extruded candy with interior ribs, comprises two identifiable ingredients, or, that it is a composite candy, as the Office Action communicates, which is notoriously old, Laskey's novel featured interior ribs have little in common with Applicant's above claimed invention. This reference does not teach what the office action relies upon it as supposedly teaching. To just omit the novel physical features and relevant teachings of the cited reference (providing ribs) and to infer that:

"Laskey, although not disclosing a composite as a support, nevertheless is further evidence of edible candy composites."

to be the basis for combining the reference of Laskey, with Van Dueren, is not sufficient, or justified.

Up to Now, Those Skilled in the Art Never Appreciated the Advantage of the Invention, Although it is Inherent.

Up to now, those skilled in the art never appreciated the advantage of the invention, although it is inherent. Breyer's and Mars Incorporated, who could be considered persons having ordinary skill in the art, since they combine their ice cream and candy ingredients, such as Snickers Candy Bar ingredients, with

cartons of ice cream, such as Breyers Brand tm Snickers Ice Cream tm, and Breyers Brand tm Snickers Cruncher Ice Cream tm, appreciated the advantage of using their candy bar to support their ice cream, as well as be suspended in it, a progressive thought; they would have implemented it, but never did. Mars Incorporated invented the Snickers Bar in 1930. Presently, Mars, Incorporated is selling a Snickers Ice Cream Bar tm in the shape of an enlarged candy bar. Even though they used the ingredients from the Snickers candy bar and made an ice cream bar, they had not thought of supporting the ice cream with a Snickers Candy Bar. Additionally, ice cream vendors in various neighborhoods have sold "frozen Milky Way Bars" from their trucks, concurrently with selling ice cream novelties for children. Therefore, those having ordinary skill in the art of frozen confections have never appreciated the advantage of the simple combination of having their Milky Way Candy Bar, or Snickers Candy Bar support ice cream, including how well it works, and therefore have shown it to be unobvious. The prior art had never tried to use a multi-ingredient candy bar as a support for ice cream, or other comestibles. Applicant has used a new principle of operation, and has blazed a new trail, other than follow one.

If the Invention Were in Fact Obvious, Because of its Advantages, Those Skilled in the Art Surely Would Have Implemented it by Now.

Additionally, if the invention were in fact obvious, because of its advantages, those skilled in the art surely would have implemented it by now. Candy bars, such as the Mars Milky Way Bar (above), the Snickers Bar, and the Baby Ruth Bar (above) have been available, every moment of every day that retail food stores have been open. One cannot shop and not see these familiar composite candy bars, since they are displayed at the cashier in nearly every food store in the United States (and presently many non food stores). Such a person having ordinary skill in the art needs to pass through this register area, at some point, when getting essential food to eat. Also, sold in these very same stores are ice cream products, ice pops, and cartons of ice cream. They have existed for generations.

Accordingly, such a person having ordinary skill in the art of making frozen supported confections, would also have had numerous opportunities, over years, to purchase ice cream at a checkout counter, in extremely close proximity of eye catching displays of composite candy bars. Not only could they have combined the two to create a composite candy support for a frozen confection, but their children, grandchildren, and great grandchildren could have combined them as well, since the Milky Way Bar was introduced in 1930 (see Amendment C), and ice cream had been introduced in the

18th century in England and the 19th century in the United States.

Since those skilled in the art have not implemented a composite candy support for a frozen confection, while passing these components weekly, and despite its great advantages, such as being inexpensive, easy to make, having easily accessible ingredients, and an economical way to provide a myriad of foodstuffs and flavors for appealing to many demographic arenas, also indicates that it is unobvious, and therefore patentable.

The Synergism of the Invention is Indisputable

Applicant's invention supplies exponential synergism. Both components, the supported confection, such as ice cream, and the support, a composite candy, are individually appealing, simple and inexpensive treats that many people can enjoy, (especially now with sugar, chocolate, and lactose substitutes, etc.). However, when combined, can delight the consumer far more than each of the separate components.

Children who are let down because a supported frozen confection on a wooden stick is so limited, and has to be eaten so quickly, can now enjoy it for a much longer time, making them happy, enabling them to continue their socializing conversations, and

remedying the problem that there should be more to the confection. This can add to the wonderful memories of childhood. Toddlers can safely consume a supported treat, as well as their older siblings, without the inherent worries of conventional sticks.

Van Dueren and Laskey Do Not Contain Any Justification To Support Their Combination, Much Less in the Manner Proposed

Additionally, in regard to the proposed combination of Van Dueren and Laskey, it is known that in order for any prior art references themselves to be validly combined for use in a prior art section 103 rejection, the *references themselves* (or some other prior art) must suggest they be combined, as was stated in In re Sernaker, 217 U.S.P.Q. 1,6 (C.A.F.C. 1983):

"[P]rior art references in combination do not make an invention obvious unless something in the prior art references would suggest the advantage to be derived from combining their teachings."

[In line with this decision, recently the Board stated in *Exparte Levengood* 28 U.S.P. Q. 2d 1300 (P.T.O.B.A.&I 1993)]:

"In order to establish a prima facie case of obviousness, it is necessary for the examiner to present evidence, preferably in the form of some teaching, suggestion incentive or inference in the applied prior art, or in the form of generally available knowledge, that one having ordinary skill in the art would have been led to combine the relevant teachings of the applied references in the proposed manner to arrive at the claimed invention.

...Accordingly, an examiner cannot establish obviousness by locating references which describe various aspects of a patent applicant's invention without also providing evidence of the motivating force which would impel one skilled in the art to do what the patent applicant has done."

Laskey's patent comprising a composite candy, like multitudes of other composite candies on the market (as above), at the time of Applicant's earliest effective date of 1994, in and of itself does not contain any "motivating force to combine this reference, solely because it is "further evidence of edible candy composites." There is no motivating force to combine a 1925 extruded candy with internal, ingredient-reducing ribs, in such a manner, as a composite candy, to determine obviousness with

regard to Applicant's support. The reference to Laskey, therefore, also does not, in combination with another, establish obviousness.

The existence of composite candy prior to Laskey's patent of 1925, through Applicants communication with the PTO in 1994, in itself is not an incentive *or inference in the applied prior art, or in the form of generally available knowledge* to make this combination, in order to establish obviousness.

There is no motivating force, incentive or inference in the applied art (Laskey's ribs, or that it is a representative of a composite candy in the art) that this reference would lead "a person having ordinary skill in the art to which said subject matter pertains," all of a sudden, after years of candy composites being widely available, for combining Laskey's 1925 extruded tubular candy patent, with that of Van Dueren's Swiss patent, due to the fact that it is "*further evidence of edible candy composites.*"

That the Suggestion to Combine the References Should Not Come From the Applicant was Forcefully Stated in Orthopedic Equipment Co. v. United States, 217 U.S.P.Q. 193, 199 (C.A.F.C. 1983):

"It is wrong to use the patent in suit [here the patent application] as a guide through the maze of prior art references, combining the right references in the right way to achieve the result of the claims in suit [here the claims pending]. Monday morning quarterbacking is quite improper when resolving the question of nonobviousness in a court of law [here the PTO]."

Additionally, the Office Action's selection of Laskey as a reference is remarkably similar to Applicant's own disclosure of the use of licorice, an extruded tubular candy, for her Malleable Support for Comestibles for frozen and non-frozen comestibles.

At the request of the office action of April 29, 2002, Applicant's malleable support for a frozen comestible, which comprised "patentably distinct species," *was deleted from the claims* of the above application and subsequently filed as a divisional application, serial number 10/183074, entitled, "Malleable Supports for Comestibles with Optional, Edible Messguards and Dripguards," and received by the PTO on June 27, 2002. **N.B.** Why is it that the same "various aspects" (Laskey's tubular candy) of Applicant's divisional application, extracted from this application, are now ironically used as a reference against this application, without "incentive or inference," in an

office action mailed March 9, 2004? (**See Exparte Levengood,**
above)

Licorice is known in the prior art as an extruded tubular candy,
which is often hollow and can contain a second comestible, making
it a composite support, such as Laskey's.

Applicant had shown this extruded candy as a support as early as
her Disclosure Document of July 5, 1994. Applicants's Disclosure
Documents of July 5, 1994 (P. 1, para. 2, lls. 19-22) and July
29, 1996 teaches of a hollow licorice [Twizzler (P. 3, l. 13, as
an edible support, and on P. 2, para. 3, ll. 20-23 recites:

"Soft licorice works well with a buffer of chocolate in the
ice cream pop part and the licorice works well uncovered in
the handle area because it does not absorb the humidity as
does some other things and become "sticky."

Drawings of Applicant's extruded candy support are shown in the
1994 Disclosure Document (Views A, B and E) and the 1996
Disclosure Document on page 6, Views A & B (described on pg. 4
under Views A and B)]

Page 43, para. 2, ll. 12-16 of Applicant's specification recites:

"A length of licorice is often hollow. The hollow middle may be filled with a more fluid-type additional fun ingredient 100, or filled with another flavor of shoestring licorice, or other confection, such as little candy beads."

Applicant notes on pg. 96 of the specification, p. 3, ll. 1-8:

"A malleable support that has a hollow center, can be filled with another confection. A more fluid or jell-type confection may be placed inside the hollow center or another edible support or comestible for a burst of flavor. A smaller rope of licorice, such as shoelace licorice, may be placed in this hollow elongated center. Tiny candy beads, or flavored and colored sugar, etc., may also be placed in the long, hollow center of a malleable support."

In addition, Figures 7-10, also show the malleable support, which are described on pages 43 - 46 of the specification. Also, Applicant's claim 8 as originally filed on August 18, 2000 recites:

The edible support of claim 1, wherein said support is malleable, said malleable support being suited for a plurality of orientations and configurations, wherein said

support is made of licorice.

Page 2, ll. 25-29 of reference 1,566,329 to Laskey, recites:

"Filled candy in tubular form is sometimes made by extruding candy material in tubular form from an extruding machine and at the same time introducing the filling into the candy tube as it is formed." (See also page 1, fig. 3)

"...Accordingly, an examiner cannot establish obviousness by locating references which describe various aspects of a patent applicant's invention without also providing evidence of the motivating force which would impel one skilled in the art to do what the patent applicant has done." Exparte Levengood 28 U.S.P. Q. 2d 1300 (P.T.O.B.A.&I 1993)] (See above)

The Office Action cites the 1925 patent to Laskey as a reference simply as "further evidence of edible *candy composites*," (providing a various aspect of Applicant's invention - tubular support) Applicant submits that the Office Action has not satisfactorily demonstrated that the "... evidence of the motivating force which would impel one skilled in the art to do what the patent applicant has done.," has been provided. Applicant further questions the legality of the use of this

reference, due to the fact that it is cited only for modifying one aspect of Applicant's invention with another aspect of Applicant's invention, without providing evidence of any motivating force for doing so. (See above *Orthopedic Equipment Co. v. United States* 217 U.S.P.Q. 193, 199 (C.A.F.C. 1983, above). Applicant therefore respectfully submits that reference 1,566,329 to Laskey (1925) for filled candy, is not legally justified and therefore the proposed combination of Laskey with Van Beuren, Chan, Tezuka et al., Firmin, Jones, and Musher is also not legally justified, and is therefore improper and should be withdrawn.

In Uniroyal, Inc. v. Rudkin-Wiley Corp., the Court Deemed, Something in the Prior Art Must Suggest the Desirability and Thus the Obviousness of Making the Combination

Uniroyal, Inc. v. Rudkin-Wiley Corp., 5 U.S.P 2d 1434 (C.A.F.C. 1988), "[w]here prior-art references require selective combination by the court to render obvious a subsequent invention, there must be some reason for the combination other than the hindsight gleaned from the invention itself... Something in the prior art must suggest the desirability and thus the obviousness of making the combination." [emphasis supplied]

Furthermore, had the Laskey reference been "other than the hindsight gleaned from Applicant's invention itself," there is still no suggestion in the prior art for the "...desirability and thus the obviousness of making the combination." Combining Laskey's composite candy with fortifying ribs with Van Dueren, still does not provide a substantially rigid composite candy support for reliably supporting a liquid ice cream, and the like. There is no desirability to do so, and the outcome of the combination does not accomplish what Applicant has done.

The Novel Physical Features of Applicant Produce New And Unexpected Results and Hence are Unobvious and Patentable Over These References

Claims 99-103, 105, 107, 108, 109, 113, 119-121, 122, 125-127, 129, 130-133, 135 and 136 were objected to under 35 U.S.C. 103(a) as being unpatentable over Van Dueren (Swiss 649,197) in view of Chan (6,177,110 and Laskey (1,566,329 further in view of Tezuka et al (4,399,153) Firmin (1,769,110) and Jones (1,947,010) and Musher (2,217,700).

As noted in the Office Action, Tezuka et al, Firmin, Jones and Musher are relied on as further evidence of edible supports for frozen confections.

Even if the combination of Van Dueren, Laskey, and Chan were legally justified, claims 139, 159, 165, and 170, still have novel (and obvious) physical features over the proposed combination.

Tezuka et al, for example, employs a support of gum. Applicant in new claim 139 recites:

139. A supported frozen comestible comprising:

- (a) a frozen comestible comprising a body of an edible substance, and
- (b) a substantially rigid composite candy support comprising two discernable edible members in contact with each other suitable for supporting said frozen comestible, said two discernable edible members each being other than an edible coating, said composite candy support having a first portion extending into said frozen comestible, said first portion having sufficient surface area and means for adherence within said frozen comestible to support said comestible, said composite candy support having a second portion extending outside said frozen comestible, said second portion having sufficient surface area to provide a utilitarian support for said comestible.

Tezuka et al., teaches of a support stick made of gum. To further combine Tezuka with Laskey, Van Dueren, or even Chan, would not provide a totally edible confection, as Applicant's claim 139, and claims 159, 165, and 170 denote, since Applicant's Supported Frozen Comestible has all edible ingredients. Applicant provides novel ingredients and a composite configuration for a novel, totally edible, dependable support for supporting a frozen confection, such as ice cream. A small child would not be able to have Tezuka's supported confection. Tezuka's support is not an edible support, nor is it candy, or a composite support. Applicant's invention is totally edible, and comprises novel physical features which produces new and unexpected dependable results and, hence is unobvious and patentable over the combined references.

Patent 1,769, 215 to Firmin (1925) discloses a candy stick with cocoa butter coating. Although comprising a cocoa butter coating for adhesion of the ice cream to the support, Firmin's stick is a simple sugar stick. Firmin does not contemplate any other ingredients in his support other than a simple sugar stick. This stick is prone to break easily, or shatter, especially when bitten into.

Applicant provides chosen ingredients to inhibit breakage, such

as caramel, peanut butter and fudge that has an amount of "give" and fracture resistance to it. Applicant's ingredients are "*suitable for supporting said frozen comestible,*" unlike the simple, fracture prone sugar stick. These ingredients also provide an array of flavors and textures within a single candy composite support. Even when the cited prior art references are combined, the result does not provide a substantially rigid and reliable support, for the rest of the confection, especially after having been bitten. Firmin's patent is very old (1925), weak and should be construed narrowly.

Patent 1,947,010 to Jones (1932) As the Office Action relates, Jones is, "... relied on as further evidence of edible supports for frozen confections." Jones' support is made of taffy. According to Webster's (c) 1966, Third New International Dictionary, taffy is a "candy usually made of molasses or brown sugar boiled until caramelized and pulled until porous and lightly colored." Jones' support, like Firmin's, even though it has a moisture resistant coating within the supported ice cream, is a simple boiled sugar stick, with a single flavor, that is very prone to breakage and snapping into two, especially when frozen, and is most unreliable. It is a single element stick and not a composite stick.

If further combined with Van Duren, Laskey, and even Chan, the resulting support would remain a single element stick. His stick is also a brittle support, leaving no advantage or "desirability" to be derived from their combined teachings. *"Something in the prior art must suggest the desirability and thus the obviousness of making the combination."* [emphasis supplied]" (see Uniroyal, Inc. v. Rudkin-Wiley Corp., 5 U.S.P 2d 1434 (C.A.F.C. 1988, above.) Applicant's novel ingredients provide for a dependable support adapted for lengthy freezing time for commercial success, and reliability for shipping and consumption. Applicants support provides a myriad of differing foods in the support for a long lasting and flavorful confection. Applicants support can also be bitten and eaten leisurely without it cracking into pieces, since the ingredients are also adapted to allow for a chewy texture. The prior art references, alone and in combination, do not do this. Additionally, Jones' patent is quite old (1932), and weak and should be construed narrowly.

Applicant's claim 152 recites:

"... g) means for providing a chewy texture to prevent cracking and breakage of said composite candy support..."

Applicant's composite candy support and its chosen ingredients, dependably and reliably supports ice cream during consumption.

This also produces new, unexpected, and superior results and hence is

unobvious and patentable over the references under 35 U.S.C. 103(a).

With regard to claim 99, now new claim 139, Patent 2, 217,700 to Musher (1940) teaches of "wood or other similar materials, or it may be of an edible baked or toasted product." If the stick is edible, it is baked or toasted and therefore porous. This unprotected stick is prone to sogginess and lacks durability and reliability. When combined with the references, as applied to new claim 139, the resultant support would have to be modified to supply the durability needed, which is not found in the references. This proposed combined support would not work properly, and cannot be relied upon for continued use. Musher's patent (1940) is also old, weak and should be construed narrowly.

Novel Physical Features of the Claims Produce New And Unexpected Results and Hence are Unobvious and Patentable Over These References

Furthermore, Applicant submits that the novel features of claims 99, 119, 125, and 130, now new claims 139, 154, 165 and 170, produce new and unexpected results and hence are unobvious and

patentable over these references under 35 U.S.C. 103(a).

Furthermore, dependent claims 140-158, 160-164, 166-169, and 171-177, incorporate all the subject the matter of claims 139, 159, 165 and 170, and add additional subject matter, which makes them a fortiori and independently patentable over these references.

These new and unexpected results are the ability of Applicants candy composite support to reliably support a liquid, or solid frozen comestible, in a frozen state for a long period of time. The support can reliably support ice cream after it has been bitten into, since it is adaptable to comprise a chewy texture. Applicant's support keeps the supported comestible frozen longer, as it is thick and well frozen on the inside. Supporting a liquid requires at least one moisture resistant ingredient, such as chocolate, or other suitable moisture resistant ingredient, so the frozen liquid adheres dependably to the stick, which Applicant provides. Other features, such as voids and roughed texture, provide for even greater adhesion of the supported comestible to the support.

Applicant also provides a composite support that comprises the novel makeup of a myriad of foods and their combinations, as opposed to the plain, boiled, flavored sugar stick in the prior

art, which is prone to fracturing. Applicant's support incorporates novel substantial foods in the support, such as nuts, fruit, chocolate and peanut butter, which has never been done before. Its size alone is a novel physical feature. Its never-before-used combined ingredients are also novel physical features. Applicant's support enhances and greatly lengthens the fun found in the traditional supported confection, while keeping the supported ice cream cold from within, since it is a thick, or chunky, well frozen support. It can be eaten at a more leisurely pace, since it will drip less. It allows the consumer to pick and choose the ingredients he or she likes best, while remaining dependable with every bite, and with every purchase.

These novel, physical features are provided by the Applicant for the very first time, which are unobvious and hence are patentable under 35 U.S.C. 103(a). This new dependable and fully edible composite candy support cannot be replicated by any of the cited references, or by any combination thereof.

The dependant Claims are a Fortori Patentable Over Van Dueren, Laskey, and Chan

Applicant submits that the novel features of the claimed invention produces new and unexpected results and hence are

unobvious and patentable over these references under 35 U.S.C. 103(a). Furthermore, new dependent claims 140-158, 160-164, 166-168, and 171-177, incorporate all the subject the matter of new independent claims 139, 159, 165 and 170, and add additional subject matter, which makes them a fortiori and independently patentable over these references.

With regard to claim 108, and 135, now new claims 148, and 174, the office action notes that Musher's support can have a lollipop placed thereon (page 5, column 1, paragraph 7) and to modify the combination for its art recognized and Applicant's intended function would therefore have been obvious.

The further combination of Musher with Van dueren, Laskey and even Chan, still does not produce a dependable support, for supporting ice cream in a freezer for a suitable length of time, for commerce. The combination of Laskey and Chan's does not dependably support ice cream (above), without necessary modifications. Laskey's composite candy does not improve Van Deren's support to a degree that Applicant provides. Van Duren has a non-reliable support, since it is highly porous and with is without further intention of using a moisture resistant coating for supporting ice cream, and Musher has an extra ingredient atop a non-edible wooden, baked or toasted porous stick.

As noted In re Sernaker, 217 U.S.P.Q. 1,6 (C.A.F.C. 1983):

"[P]rior art references in combination do not make an invention obvious unless something in the prior art references would suggest the advantage to be derived from combining their teachings."

The combination of these references does not result in a composite candy support that is dependable for supporting a frozen comestible, even if the combination is fitted with a lollipop. There is no desirability or advantage in combining these references. The modification of the references for its art recognized and applicant's intended function is therefore not obvious.

In regard to claim 109, Jones discloses a wafer on one side of the confection. The office action notes: To provide two cookies like a conventional ice cream sandwich for its art recognized and applicant's intended function of providing a different feel and taste would have been obvious.

Claim 109, now new claim 149 reads:

149. "The supported frozen comestible of claim 139, further

including a plurality of cookies on the front and back of said supported frozen comestible comprising a body of an edible substance, for providing a sandwiched supported frozen comestible."

Jones' objective is, "to provide a confection in which the connection between the ice cream or other frozen substance and the handle is effected through the intermediation of a wafer of relatively large surface area to one side of which the ice cream readily adheres, and hence is less likely to be adversely affected by high temperatures, than is the case with such confections skewered onto sticks in the manner heretofore known." Jones provides for extra adhesion to the stick. Applicant's claim 149 recites: "... for providing a sandwiched supported frozen comestible." Applicant solves a different problem than the reference to Jones. This different problem is recited in Applicant's claim 149. In addition, Jones hadn't ever anticipated adhering a surface increasing wafer to an edible candy composite support.

New claim 149 is a fortiori patentable, since the prior art references have not shown that a combination of the art would produce a moisture resistant, durable support for a liquid ice cream, and the like. In addition, the further combination of the

references do not provide a dependable candy composite support for supporting a sandwiched frozen comestible.

Rejections are Overcome Regarding Claims 104, 124, 128, 134, and 137 under 35 USC 103(a) as Being Unpatenable Over the References

The office action of March 9, 2004 states that claims 104, 124, 128, 134, and 137 under 35 USC 103(a) as being unpatenable over the references as applied to claim 99 above, and further in view of Hart et al (6,054,158) who is relied on in the last office action to teach it would have been obvious to modify the combinative and provide self-supporting capability to the support.

Applicant's claims 104, 124, 128, 134, now new claims 144, 164 and 174 recite a free standing base for providing a free standing supported frozen comestible and further includes a plurality of free standing bases.

In Applicant's July 29, 1996 Document Disclosure (serial no. 403049, enclosed), views C and D show a flat portion for standing Applicant's frozen confection upright on its end. Applicant shows that this freestanding feature had been conceived prior to Hart's earliest effective date, which is his filing date of June 23,

1998 (see above).

Additionally, Hart's stick is constructed of molded plastic. He does not show a composite candy support made of two discernable edible members. It is also not determined that Hart's support is adapted to support ice cream. A combination of the references as applied to claim 99, now new claim 139, further in view of Hart et al., does not provide a dependable composite candy supported frozen comestible, that is able to stand upright.

Rejections to Claims 106 and 117 Under 35 U.S.C. 103(a) are Overcome:

Claims 106 and 117 are rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 99, above and further in view of Eales (5,066,502) and Overland (2,500,006), who teaches the use of two handles on a confection is notoriously old and to modify the combination for its art recognized and applicant's intended function would have been obvious.

Claims 106 and 117, now new claims 146, 168 and 171, recites:

"The supported frozen comestible of claim 99, further

including a sufficient surface area on said second portion so that a person can hold said composite candy support and said frozen comestible with a hand, said sufficient surface area further includes supplying two handles to said person, one for each hand."

The references as applied to claim 99, and new claim 139, 165, 170, above, do not render a dependable composite candy support for ice cream. Patent 5,066,502 to Eales provides two handles on a sucker. Patent 2,500,006 to Overland teaches the use of two inedible handles on a frozen confection. Neither Eales nor Overland, even in combination with the references as applied to claim 99, provide a dependable composite candy support for ice cream that provides two handles.

Rejection to Claim 110 Under 35 USC 103(a) Has Been Overcome

Claim 110 is rejected under 35 USC 103(a) as being unpatentable over the references as applied to claim 99, and further in view of 4,001,440 to Hoyt who teaches voids in supports for better securement. The office action notes that 3-D frozen comestibles are notoriously old.

Applicant's claim 110, now new claim 150 recites:

"The supported frozen comestible of claim of 139, further including a void in said composite candy support, said void comprises means for providing additional adherence of said frozen comestible comprising a body of an edible substance to said composite candy support for avoiding said frozen comestible prematurely falling off said composite candy support during consumption, said composite candy support further comprises a plurality of voids."

Applicant's new claim 150 incorporates all the subject matter of new claim 139, which supplies a dependable candy composite support suitable for supporting a liquid comestible and which comprises voids for better adherence and superior designs. Hoyt does not do this. Hoyt's support stick is not an edible stick. In further combination with the references as applied to claim 99, new claim 139, an edible candy composite support suitable for supporting a frozen comestible is not created, nor is a 3D design created on a dependable candy composite support.

The Objection to Claim 111 as Rejected under 35 U.S.C. 103(a) Has Been Resolved

Claim 111 is rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 99 above,

and further in view of Oprean (1,913,851) who teaches it is well established to decorate frozen confections.

Applicant's claim 111, new claim 151, recites means for decorating and depicting features and clothing on a whimsical supported frozen comestible, including decorating a whimsical confection comprising a lengthy appendage.

Oprean provides a 3-D figure atop an inedible support. He does not envision it atop an edible support. In further combination with the references as applied to claim 99, the references do not provide a three dimensional, frozen decorated confection dependably supported on a composite candy support.

The Rejection to Claims 112 and 123 Under 35 U.S.C. 103(a) is Overcome

Claim 112, 123 are rejected Under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 99 and further in view of Barricini (2,469,509) who teaches of a polyethylene stick used to support a non-frozen confection, such as a lollipop, which has a tapered reinforcement for the upper end of the stick.

Applicant's claims 112 and 123, now new claims 152, 163, and 177, recite means for manufacturing Applicant's dependable composite candy support with ingredients that sustain more stress against breakage, and means for placing them within the support for a strong support and ways of resisting breakage.

Barricini uses tapered reinforcements to fortify a plastic stick for a candy lollipop-type confection. His support has raised rigged portions on both sides of the stick. Even if the references as applied to claim 99, new claim 139, were combined in further view of Barricini, an edible, dependable composite candy support suitable for supporting ice cream, could not be constructed from their teachings.

**The References as Applied to Claim 99 in Further View of
Reference to Aujourd'hui Do Not Meet Applicant's Claims**

Claim 114 is rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 99 and further in view of Ref. Q (Swiss 647,394) as being unpatentable since it would be obvious to add a protective messguard for applicants intended function.

Applicant's claim 114, now new claim 154, recites a protective

mess guard on the composite candy support, for providing a physical barrier for effectively keeping fingers from melting ingredients from getting messy.

Swiss patent 647,394 to Aujourd'hui provides a wafer to the outside of a pastry. The references as applied to claim 99, now new claim 139, in further view of Aujourd'hui still do not provide a candy composite support durable for supporting Applicant's frozen supported comestible, even when supplied with a messguard. When combined, these references do not meet Applicant's claims of providing a dependable composite candy support for supporting a frozen confection. Aujourd'hui's patent is not frozen, is not supported, and is not candy, and is non-analogous art.

**Claim 115 as Rejected under 35 U.S.C. 103(a) as Being
Unpatentable Over the References in Further View of Suskind and
Parr is Remedied**

The Office Action of has rejected Claim 115 under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 99, now new claim 139, and in further view of patent 2,632,708 to Sueskind (1953) and patent 1,835,719 to Parr (1931), who both teach of an edible dripguard.

Applicant's claim 115, new claim 155, recites a protective dripguard for catching melting portions and for preventing a mess on fingers and clothing. Applicant's drip guard comprises both edible and inedible dripguards.

Although Sueskind and Parr both comprise a dripguard, they only provide an inedible stick. They do not provide a composite edible support made of candy, nor is it envisioned, by either. The combination of Sueskind and Parr together with the references, as applied to claim 99, now new claim 139, result in a non-reliable biscuit support with reinforcing ribs or a different flavor candy, and a dripguard. This support is not suitable for supporting ice cream, or other liquid frozen comestibles. Applicant provides new physical properties to provide such a dependable edible composite support, which had never thought to have been done before, or by any combination thereof, and which is therefore, unobvious and patentable. In addition, both Sueskind (1953) and Parr (1931) are fairly old and should be construed narrowly.

The References in Further View of Heinrich, Do Not Provide a Candy Composite Support

Claim 116 is rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 99, now new claim 139, and in further view of patent 5,435,143 to Heinrich who discloses the conventionality of a plurality of frozen confections.

Applicant's claim 116, now new claim 156, recites a plurality of differing frozen comestibles supported on the composite candy support, which comprises a plurality of colors, shapes, sizes, flavors, and ingredients, and further comprises an edible coating over each of the differing frozen comestibles for added separation, texture and flavor.

Heinrich teaches of a machine and a method for making hardened confections having complementary parts joined in a unit. Heinrich teaches of a traditional stick made of "wood, polymer, paper, or other material as is known in the art," for supporting one ice cream within another. Heinrich does not contemplate supporting his plurality of ice cream on a candy composite support, as it does not exist in the prior art. The references as applied to claim 99, now new claim 139, and in further view of Heinrich, do not provide a candy composite support, for supporting a plurality of frozen comestibles, as does Applicant. Applicant is first to provide such a candy composite support because of new physical

properties, including specially chosen ingredients, which provides surprisingly new results, which is therefore patentable and unobvious.

Claim 138 as Rejected under 35 U.S.C. 103(a) as Being Unpatentable Over the References, Has Been Overcome

Claim 138 is rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 99 and further in view of Kocharian et al (4,350,712)in view of Berman (6,261,611), Parr (1,835,719) and Sueskind, 2,632,708.

Applicant's claim 138, now claim 177, recites a moveable sleeve of a predetermined shape surrounding the sides of the frozen comestible for exposing the comestible for consumption, and for providing a pushing pop supported comestible.

Kocharian's patent comprises frozen beer or wine on a stick included in a cup-like heat shield. His support is not edible. Berman's patent provides a hand held food package for pastas, burritos and the like. His stick is made of plastic, styrene or wood, and is not edible. Parr and Sueskind, as above, also utilize inedible sticks. The references, as applied to claim 99, now new claim 177, in further view of Kocharian et al., Berman,

Parr, and Sueskind, do not provide a candy composite support, suitable for supporting a frozen comestible, such as ice cream.

These novel features are patentable over the references as applied to claim 99, now claim 139, and in further view of Kocharian, Berman, Parr and Sueskind. Even if all the above references were combined, they do not meet Applicant's claims. If all the references were combined, they still do not supply Applicant's reliable and edible candy composite support for supporting a frozen confection.

Applicant provides this dependable composite edible support for the first time. Applicant's supported frozen comestible is reliably supported and able to be eaten without the inevitable distress of probable fracture. Applicant's invention provides novel physical features, which allow a liquid-type frozen comestible to be dependably supported by a composite candy.

Accordingly, applicant submits that the dependent claims are a fortiori patentable and should also be allowed.

Summary

Prior art has used a simple sugar stick to support frozen

confections. Prior art, and the combinations thereof, had never thought to use a chunky composite candy bar to support ice cream and the like. Although prior art has used different features along with their sugar sticks, they have not used a plurality of different comestibles in their support to remedy the problems of easily fractured sticks.

Applicant provides new physical properties, including specially chosen ingredients, a plurality of flavors and ingredients, moisture barriers, and a composite candy support for dependably supporting a liquid frozen comestible, for a fully edible supported comestible. This provides surprisingly new results. These physical properties are unique, unobvious, and hence patentable under 35 U.S.C. 103(a). In addition, the fact that so many references must be combined to meet Applicant's invention is evidence of unobviousness.

Accordingly, Applicant submits that the dependent claims are a fortiori patentable and should also be allowed.

Conclusion

For all of the above reasons, Applicant submits that the specification and claims are now in proper form, and that the

claims all define patentably over the prior art. Therefore she submits that this application is now in condition for allowance, which action she respectfully solicits.

Very Respectfully,



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Certificate of Mailing: I certify that on the date below, this document and referenced attachments, will be deposited with the U.S. Postal Service as first class mail in an envelope addressed to "Assistant Commissioner for Patents" Arlington, Va. 22313

June 8, 2004



Alice O. Kiely

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